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Supreme Court of the United States

OCTOBER TERM, 1965

No. 1282

NOREN HARVEY, an Infant, and BIVENNE HARVEY, an Infant, by their Guardian *ad Litem*, TUCK HARVEY, and HEIDI and TUCK HARVEY, Individually,

Petitioners,

—against—

CHEMIE GRUNENTHAL, G.m.b.H.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, filed December 15, 1965, and the denial of a petition for rehearing and rehearing *in banc* on February 8, 1966, affirming a final judgment of dismissal entered in the United States District Court for the Southern District of New York on May 15, 1964, on the basis of the holding that there was no jurisdiction of the defendant under New York State law.

The opinion of the Court of Appeals is reported at 354 F. 2d 428. Said opinion is set forth in the appendix to this petition.

Jurisdiction

By reason of diversity of citizenship by and between the plaintiffs in the State of New York (except the mother Heidi Harvey, an alien), and the defendant, a corporate citizen of West Germany, jurisdiction was invoked under federal diversity rules and sufficiency of the jurisdictional amount. The complaint was dismissed on May 15, 1964, and the Court of Appeals, by order dated October 20, 1964, suspended hearing the appeal pending the disposition in the New York Courts of an appeal in *Feathers* v. *McLucas,* for clarification of the scope of C.P.L.R. 302(a)(2), the N. Y. long-arm statute, by the New York Court of Appeals.

Jurisdiction to review the judgment by Writ of Certiorari is found in 28 U.S.C. 1254(1), 2101, and Rule 19(1)(b) of the Rules of this Court.

Questions Presented for Review

I

Is there an offense "with traditional notions of fair play and substantial justice", contrary to this Court's current holdings on federal jurisdictional power in diversity of citizenship cases, where the Court of Appeals for the Second Circuit, by affirming the District Court's order of dismissal on a motion, deprived the deserving petitioners of their rights in the only forum in which they can proceed against a foreign respondent having a record of purposeful activity and presence in New York State?

This question is posed in the context of the record showing respondent foreclosed any redress in West Germany by obtaining a declaratory judgment on default

against petitioners while the appeal was pending below. The record also discloses respondent entered into several contracts in New York State with Richardson-Merrell, Inc., a New York pharmaceutical company, for the distribution, massive testing and eventual sale of Thalidomide in New York, other states and countries; that its agents in New York over many years filed patents and trademark applications in Washington, including the drug Thalidomide; that respondent's personnel came to New York relative to the New York contracts; that respondent entered into other contracts in New York with other concerns over a period of many years; that respondent realized a profit of $10,000.00 by virtue of its New York contract with Richardson-Merrell, Inc., after Thalidomide was publicly declared to be toxic to pregnant women and the cessation of testing that involved approximately 1000 physicians and 20,000 patients in this country; that New York and Federal law was expressed and invoked in its contracts and applications. These so-called "scattered activities in New York State," so characterized and not detailed in the opinion below, are more fully set forth under Statement of the Case, *infra*.

II

Did the Court below misconstrue, and thereby prejudice the rights of New York State domiciliaries, by failing to find the "long arm statute" of New York, Section 302(a) of the New York Civil Practice Law & Rules, applied to a foreign defendant which in person and through a New York agent transacted business for years related to Thalidomide within the State, and committed a tortious act with impact within the State?

III

Should the Court below have followed the parent Illinois legislative and decisional history, on which New York's C.P.L.R. 302(a) is based, to agree with *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 751, that on "hornbook law" definition there can be a tortious act within the state by initial out-of-state fault, so that the expression "tortious act" contains within it the element of liability for resulting injuries that occur in the New York forum?

IV

Is this respondent amenable to federal jurisdictional power, without regard to limited state rules, by reason of the uniquely international nature of respondent's transactions and activities in Europe and throughout the United States; and further, by the alien citizenship of petitioner Heidi Harvey, the aggrieved mother?

V

Does the Court below improperly rely upon a factually and legally distinct triad of decisions by the New York Court of Appeals in *Longines-Wittnauer Watch Co., Inc.* v. *Barnes & Reinecke, Inc.*, 15 N.Y. 2d 443, 261 N.Y.S. 2d 8, to disregard the State's policy and primary concern for its domiciliaries by affirming the dismissal of actions that could only be brought in the New York forum?

VI

Is there not raised in this case the issue of the U. S. Constitution on due process, by-passed by the Court below and a subject of conflict between the Circuits, where the *Longines* opinion on which the opinion below turned,

includes the concurring opinion by Van Voorhis, J., who stated that a broader interpretation of C.P.L.R. 302(a)(2) "would be likely to conflict with the Federal Constitution" (15 N.Y. 2d at p. 468)?

VII

At the very least, should the Court of Appeals for the Second Circuit be directed to certify the question of *in personam* jurisdiction under the facts involved herein to the highest State Court?

Statute Involved

New York Civil Practice Law and Rules, Section 302:

§302. Personal jurisdiction by acts of non-domiciliaries.

(a) Acts which are the basis of jurisdiction. A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person, or through an agent, he:

1. transacts any business within the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or . . .

Section 301:

§301. Jurisdiction over persons, property or status.

A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

Statement of the Case

Petitioner, Tuck Harvey, a citizen of the State of New York, and petitioner, Heidi Fischer Harvey, a non-citizen at all the material times, were married on Long Island in June of 1960, with residence in New York State. She brought with her from Europe a supply of pills called "Contergan", prescribed by a German doctor, created, manufactured, and distributed by the respondent, a West German pharmaceutical concern. These tranquilizer pills were taken by the petitioner, Heidi Harvey, from June of 1960 to and after September of 1960, when she became pregnant. On May 18, 1961, she gave birth in New York State to Noren and Bivenne Harvey, the other two petitioners, who were born with serious physical deformities, from a condition known as phocomelia. Noren has shortened and warped arms and hands; Bivenne has duodenal atresia and a recto-perineal fistula among other deformities, all permanent in nature. It was established that "Contergan" contained Thalidomide, which is highly toxic and especially dangerous to infants in foetus. There was a negligent failure of warning by respondent and its American agents, though large quantities of the toxic drug were shipped by respondent for use in this country.

Suit was commenced in the U.S. District Court for the Southern District of New York in the Fall of 1963, alleging negligence and breach of warranty. The respondent appeared specially and moved to dismiss the complaint on the ground of absent *in personam* jurisdiction, granted by Sugarman, D.J., on May 15, 1964, and affirmed by the Court below.

The petition for rehearing contended that the Court below limited consideration and gave erroneous meaning

to respondent's "scattered activity in New York State". Respondent's pattern of contacts throughout the United States, gleaned from affidavits and briefs on the motion to dismiss, makes it manifestly clear that this non-American corporation had purposeful activities and "presence" which centered in New York, and emanated from the New York forum throughout the United States and to other nations. The quality and nature of its acts in the United States are manifest in the record.

The following facts, not fully set forth in the opinion below, demonstrate respondent's multiple contacts and reasons in law and equity for jurisdictional assertion:

1. The petitioners are precluded from suing in any other jurisdiction, including Germany, the latter by reason of a declaratory judgment obtained by the respondent in West Germany on July 10, 1964, while the instant appeal was pending in the Court below.

2. With respect to the issue of applying the state standard for jurisdiction in diversity of citizenship cases, petitioner Heidi Harvey, the aggrieved mother, was a resident alien at all the material times, and as to her on pendent jurisdiction the suit was between alien and alien, without diversity.

3. On April 15, 1958, the respondent filed in Washington, D.C., through a New York agent, patent 2830991 for Thalidomide, and had six U.S. patent applications filed between 1953 and 1956, and again in 1959, employing four patent agents in New York City.

4. The respondent's personnel made several business trips to the United States, the last in September of 1961, after the deformed children were born in May of 1961.

5. The respondent had business contacts with the Lederle Laboratories of American Cyanide Corporation at Pearl River, New York, for approximately 8 years, the details of which are not yet fully disclosed.

6. The respondent entered an exclusive licensing agreement on the drug Thalidomide with Vicks Chemical Company, on September 11th, 1958. This latter company also known as Richardson-Merrell, Inc., with its principal office in the City of New York, accepted service of process in the instant case. There is no issue on the propriety of service of process on respondent and its agent.

7. From 1958 to 1960, the respondent shipped to its agent in New York, Richardson-Merrell, Inc., samples and chemicals, and in 1960, 2,100 kilograms of Thalidomide came to this same agent to be processed in its Ohio plant. This was done by two shipments, and effected during the 27th to the 45th days of the pregnancy that resulted in the birth of the deformed twins herein.

8. There was a supplementary contract with Richardson-Merrell on September 22, 1961, dealing with Thalidomide processing and promotion; and again on October 2, 1961. The contract by and between the respondent and its New York agent referred to New York law, and New York is one of the places of execution recited in the contract.

Respondent's affidavit of January 11th, 1964, by Walter Herzfeld, Esq., containing admissions that six U.S. patent applications had been "filed and prosecuted by Grunenthal" in Washington, D.C. between 1952 and 1956, also sets forth that when the license to Richardson-Merrell was abandoned in 1961, after disclosure of the deleterious

effect of the drug on pregnant women, the respondent nonetheless received from Richardson-Merrell the sum of $10,000.00; and also concedes that there were license agreements between respondent and other U.S. concerns.

9. The intense American public reaction to news of the true nature and effect of Thalidomide, also prompted Congressional reaction. There are recorded in the Congressional Record-Senate, September 4, 1962, the remarks of Mr. Douglas, as follows:

> That this drug "was prescribed as a sleep inducer, a cough suppressor, a bellyache quieter, and an antidote for 'morning sickness' in pregnancy . . .
>
> "Therefore, the number of doses of thalidomide distributed over the country was considerably greater than the number calculated on the basis of a 200 milligram average dose.
>
> "With such a broad distribution, some questions logically arise:
>
> "At what point does medical experimentation end and when does sample salesmanship begin?
>
> "Was thalidomide actually on the American market in every sense except a sale price?
>
> "Could FDA possibly be sure that only 19,822 persons took Merrell's thalidomide pills?"

During all material times—before, during and after the pregnancy, the respondent through its agents, including the New York agent Richardson-Merrell, Inc., had multiple and continuous dealings in the United States, sought and obtained the benefits and protections of our laws, and profited by its activities here. Respondent's failure to

timely warn more than 1000 American physicians who took part in the experimentation on about 20,000 patients, is compounded by its continuing representation to all, including petitioners' obstetrician, that the use of Thalidomide so generally distributed to the public market in every detail but a sales price, was safe and harmless during the period of pregnancy.

Reasons for Granting the Writ

The significance of the opinion below in the sensitive and evolving field of diversity jurisdictional power, written with apparent disregard of the paramount authority of well-defined principles enunciated by this Court, is that it seeks to unduly restrict petitioners' rights by referring to a factual pattern of a case or cases not in point. In these other cases the losing parties could have had redress in a different forum. It must be true that the availability of a viable forum for the vindication of legal rights must strongly affect this Court's review.

See: *Diversity Jurisdiction, A Symposium,* 40 Indiana L.J. (Summer 1965) 511 at p. 534.

Referring to *Feathers* v. *McLucas* and *Singer* v. *Walker,* Professors Arthur T. von Mehren and Donald T. Trautman in a joint article *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 Harvard L. Rev. 1121 (April 1966), pertinently stated the following:

> "Here plaintiffs are not involved themselves in multistate activity and presumably lead highly localized lives, while defendant's commercial involvement in multistate activity has led, although the chain of circumstances is long, to an intrusion in plaintiff's affairs. There is every reason to disturb the traditional

bias in favor of defendant in this case" (p. 1171 of 79 H. L. R.).

and further:

"Another form of jurisdiction by necessity may also eventually emerge: the assertion of jurisdiction in the interest of justice in those rare cases in which no forum that is appropriate under conventional standards is prepared to act" (pp. 1173, 4 of 79 H. L. R.).

The order affirmed by the Court below applied a discredited and inapplicable jurisdictional standard of "a continuous and systematic course of doing business". Regardless of whether State or Federal jurisdiction standards are applied, in the context of the quality and nature of respondent's more than minimal and profitable contacts for many years in the State of New York, which persisted before, during and after the pregnancy that resulted in the tragic birth of two deformed children, jurisdiction should have been allowed and the issues determined on their merits.

Petitioners contend that, even under the old and strict rule of "doing business" for jurisdiction *in personam,* there was sufficient purposeful activity of a continuous nature by respondent itself, and through agents in this forum; and further, that the cases cited on the purported New York standard are inapposite, distinguishable, and themselves point to pertinent considerations of public policy, fair play and substantial justice. This Court's current and elastic principles affecting the "doing business" test, should have been followed to prompt a reversal of the harsh order below.

Concisely stated, the major contentions for review and reversal are as follows:

1. Controlling opinions by the United States Supreme Court on the stretch of jurisdiction, regardless of long-arm statutes, clearly grant jurisdictional power to the Federal Court if otherwise there would be an offense "with traditional notions of fair play and substantial justice". *International Shoe Company* v. *Washington,* 326 U.S. 310; *McGee* v. *International Life Insurance Co.,* 355 U.S. 220.

The indicia to determine "presence" for *in personam* jurisdiction, includes purposeful activity; minimum contact; defendant invoking the benefits and protection of State laws; public policy to protect citizens from outside risk of physical harm and economic loss; consideration of whether the plaintiffs have recourse in another forum—all favoring petitioners' prayer for jurisdiction herein.

2. The State standard applicable before C.P.L.R. 302(a), favors the retention of jurisdiction herein. The opinion of the New York Court of Appeals in *Simonson* v. *International Bank,* 14 N.Y. 2d 281, 251 N.Y. Supp. 2d 433, on which the instant opinion partially turned, refers to not hesitating "to discard prior precedent where adherence thereto 'offers not justice but unfairness, not certainty but doubt and confusion' . . . (Cases cited)" (p. 437 of 251 N.Y. Supp. 2d).

3. The landmark case in New York with respect to jurisdiction on "doing business" prior to enactment of C.P.L.R. 302(a), not considered in the opinion below, is *Tauza* v. *Susquehanna Coal Company,* 220 N.Y. 259, a 1917 decision by Judge Cardozo. There the Court held that activities insufficient to make out a transaction of business may yet be sufficient to bring a corporation within the state so as to render it amenable to process, even if the nature and quality of the activity be interstate in

character. He held further that jurisdiction would not fail because the cause of action sued upon had no relation in its origin to the business transacted here, inasmuch as " . . . the validity of the service is independent of the origin of the cause of action." Judge Learned Hand in *Bomze* v. *Nardis,* 165 F. 2d 33 (C.A. 2, 1948), further defined the *Tauza* test to be "whether the corporation was 'present' in the state by virtue of those activities which it there set in motion," and jurisdiction follows if the corporation is present, "regardless of whether the particular liability in suit has arisen out of the activities which collectively constitute the 'presence'." It would therefore seem that "presence" was determined by a balance of opposing interests as to whether accepting jurisdiction would unduly burden interstate commerce.

Kaufman, C.J., in *Blount* v. *Peerless Chemicals, Inc.,* 316 F. 2d 695, cert. den. 375 U.S. 831, stated that where the corporation's activities are afforded protection by state law, though it does not have an office or principal place of business here, " . . . it ill behooves the corporation to complain about appearing there to litigate," and " . . . the state has an interest in subjecting to its judicial process a corporation whose activities in that state expose its residents to a risk of physical harm or economic loss."

4. C.P.L.R. 302(a) allows acceptance of jurisdiction on either of its two requisites, as here in person, and through agents, the respondent transacted business within the State, and committed a tortious act with impact within the State by the manufacture and distribution of the toxic drug, and its continuous representation of fitness for use within the State before and during the fateful pregnancy.

Though C.P.L.R. 302(a) is not required to find jurisdiction in the New York forum, nonetheless the Court

below should have followed the parent Illinois legislative and decisional history, on which New York C.P.L.R. 302(a) is based, to agree with *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Illinois 2d 43, 176 N.E. 2d 751, that on "hornbook law" definition there can be a tortious act within the State by initial out of state fault, so that the expression "tortious act" contains within it the element of liability for resulting injuries that occurred in this forum. See the incontrovertible dissent by Chief Judge Desmond in *Longines, supra,* p. 470 of 15 N.Y. 2d.

Here was a continuing representation and assurance by respondent through its activities in this forum of fitness for use. That the drug was purchased in Europe is "merely fortuitous". See: *Scott* v. *Middle Eastern Airlines Co.*, 240 F. Supp. 1, 5. New York's vital concern with the drug Thalidomide and its effect on children born and domiciled here, is too obvious for speculation on what the State standard would be if this case were in a State Court. Jurisdiction of the subject matter is in New York, uncontested by respondent herein.

Under *Longines, supra,* on which the opinion below depends, it was held that where the respondent's activities within the state are for a purposeful attempt to avail itself of the New York market, then there would be sufficient contact (15 N.Y. 2d at p. 458, 261 N.Y. Supp. 2d at p. 19). Unlike *Feathers, supra,* where the offending article was passing through N.Y., from one state to another, the respondent herein actually had purposeful business activities and contacts in New York that eventually emanated to other jurisdictions. The composite of all its American activities should not defeat N.Y. jurisdiction on the ground of local "scattered activities".

See: *Banco* v. *Sabbatino*, 376 U.S. 398; *Scott* v. *Middle-East Airlines Co., supra*, p. 4 of 240 F. Supp. by Palmieri, D.J.

5. The New York Court of Appeals, subsequent to the May, 1965 *Feathers* decision, in *Lewin* v. *Bach Laundry Machine Co.*, 16 N.Y. 2d 1070, 266 N.Y. Supp. 2d 391 (C.A. N.Y., December 1, 1965), held that a machine built out of the state, used in New York, and caused injuries in New York, would prompt the single act statute to assert jurisdiction, for the corporation would have reasonably expected "that its product would be sold in and used in New York". Respondent herein expected the same and actually realized $10,000.00 on the basis of a N.Y. contract with its N.Y. agent. Compare *Johnson* v. *Equitable Life Assurance Society of the U.S., et ano.*, 16 N.Y. 2d 1067, 266 N.Y.S. 2d 138 (December 1, 1965), the New York Court of Appeals certifying a question on jurisdiction, where the factual pattern set forth at 22 A. D. 2d 138, 254 N.Y.S. 2d 258, related substantially to the factual pattern in *Gray* v. *American Radiator & Standard Sanitary Corp., supra.* This demonstrates a further development of New York law to conform with the Illinois interpretation of a "tortious act within the State."

6. This Court in *Clay* v. *Sun Insurance Office Ltd.*, 363 U.S. 207, 80 S.Ct. 1222, majority opinion by Mr. Justice Frankfurter, remanded a question on jurisdiction for certification of questions to the Florida Supreme Court, suspending decision until it could secure a State Court's determination of any unresolved question of its local law. The dissent in *Clay* likewise favors petitioners' position herein, where Justices Warren, Black and Douglas wrote that absent an authoritative State ruling to the contrary, a State may be presumed to intend to apply its local law

to interstate transactions to its outermost constitutional limits (pp. 215, 216 of 363 U.S.). In the second *Clay* decision at 377 U.S. 179, the Court dealt with an ambulatory insurance contract issued by a British corporation on which suit could be brought in any of several states. Florida law was applied to a policy issued in Illinois, for "We see no difficulty whatever under either the Full Faith and Credit Clause or the Due Process Clause." The constitutional question was raised in the *Longines* case, *supra,* by the concurring opinion of Van Voorhis, J., stating that a broader interpretation of C.P.L.R. 302(a) "would be likely to conflict with the Federal Constitution". 15 N.Y. 2d at p. 468, 261 N.Y.S. 2d at p. 27. See Homburger, *The Reach of New York's Long Arm Statute, Today and Tomorrow,* 15 Buffalo L. Rev. (Fall, 1965) 61, footnote 40 at p. 66, citing cases which set forth the conflict between the Circuits on this constitutional question.

"The Federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction". *Byrd* v. *Blueridge Electric Cooperative, Inc.,* 356 U.S. 525, 537. This Court should direct the lower Courts to take the course which sound judgment demands, if it finds there is no definitive state decision, or that the state law is vague or disagreeable. *Dailey* v. *Parker,* 152 F. 2d 174, 177; *Ohio Casualty Insurance Co.* v. *Smith,* 297 F. 2d 265.

CONCLUSION

This Court's concern with traditional notions of fair play and substantial justice, supplemented by reason and cases cited, should prompt granting the petition as well as a summary reversal of the harsh order of dismissal so that petitioners may fairly proceed to a trial on the merits in the only forum available to them. Respondent's multiple activities here spell out pre and post C.P.L.R. 302(a) jurisdiction. Its presence in the New York forum for profit under the protection of New York and federal laws is clear in the record. If this case were in a New York Court, the policy to protect its innocent domiciliaries from harm and economic loss would undoubtedly have prompted State assertion of jurisdiction. If this is uncertain, at the very least, with the interests of petitioners so dramatically and finally involved, the issue should be certified to New York State's highest Court before rendering any decision that would deprive the deserving petitioners of their day in Court.

Respectfully submitted,

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